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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANDRE MAURICE GRUBBS, Defendant and Appellant.	A120187 (Contra Costa County Super. Ct. No. 5-061600-3)

Defendant Andre Maurice Grubbs appeals from a judgment convicting him of two counts of committing a lewd act on a child under the age of 14 years and sentencing him to six years in prison. He contends the court erred (1) in allowing the prosecutor to amend the information in midtrial to enlarge the time frame in which the acts were alleged to have been committed; (2) in excluding evidence of the victim's prior exposure to sexual materials; and (3) in admitting his confession which he asserts was involuntary and obtained in violation of *Miranda*.[1] Defendant also asserts that the prosecutor committed misconduct in closing argument. We shall affirm.

Procedural History

Defendant was charged by complaint with six counts of committing a lewd act on a child under the age of 14 years (Pen. Code, § 288[2]) between December 2002 and October 2004. Defendant waived preliminary hearing and was charged by information

[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

[2] All statutory references are to the Penal Code unless otherwise noted.

with six counts of violating section 288. Count one was alleged to have occurred on October 6, 2004. Count two was alleged to have occurred on or about July 2004 through October 5, 2004. Count three was alleged to have occurred on or about November 2003 through June 2004. Court four was alleged to have occurred on or about January 2004 through October 2004. Count five was alleged to have occurred on or about December 2002 through December 2003. Count six was alleged to have occurred in November 2002. The information alleged further that each of the above incidents included substantial sexual conduct under section 1203.066, subdivision (a)(8).

During trial, over defendant's objection, the court granted the prosecution's motion to amend the information with regard to the dates on which counts two, three, four, and five were alleged to have occurred. The lewd act in each amended count was alleged to have occurred on or about November 2002 to October 2004.At the conclusion of the prosecution's case, the court granted defendant's motion to dismiss amended count five.

The jury found defendant not guilty of count one, guilty of count three with substantial sexual conduct, guilty of count four without substantial sexual conduct, and not guilty of count six. The jury was unable to reach a verdict on count two, which was dismissed. Defendant was sentenced to prison for six years and filed a timely notice of appeal.

STATEMENT OF FACTS

The victim, who was 11 years old and in the sixth grade at the time of trial in September 2007, testified that defendant, her then 21-year-old cousin, molested her on a number of occasions, usually when babysitting her and her younger brother.

In the interest of brevity, the following recitation of the evidence focuses primarily on the evidence related to the two counts on which the jury found defendant guilty, counts three and four. The prosecutor explained in closing argument that count three involves an incident that happened in the living room of the home of the victim's grandmother and count four involves an incident that took place in defendant's bedroom.

With respect to count three, the victim testified that when she was in third grade, defendant molested her when they were alone in the living room of the grandmother's home. Defendant put "his penis in [her] behind" and moved it up and down while she was on the floor on her hands and knees. With respect to count four, the victim testified that when she was in the third grade, defendant molested her in his bedroom. She was in the room with defendant and her brother when defendant pulled down her pants and his pants, and put "his penis in [her] behind." She was on the floor on her hands and knees and defendant moved his penis up and down. Defendant told her brother, who was facing a different direction, not to look. After defendant pulled up his pants and left, her brother asked why she let defendant do that and she responded that she had not wanted him to. The brother, who was in kindergarten at the time the offense occurred, confirmed that he was in the room and saw defendant molest his sister. Defendant's clothes were off and his sister's pants and underwear were halfway down. Defendant was standing behind her and his "private part" was touching her buttocks. Defendant told him to keep playing and not to turn around. He did not tell a grown-up what he had seen because he thought no one would believe him.

On cross-examination, the victim testified that she had never seen her mother having sex with men in her home and had never seen X-rated videos or X-rated magazines. She could not remember telling her grandmother that she had seen those things, but did remember telling her grandmother that she "didn't like it when [her mother] was having sex and [she] could hear it." The victim acknowledged that she was comfortable discussing her mother's sexual activity with her grandmother.

San Pablo Police Detective Scott Cook interviewed defendant on December 28, 2005. A redacted videotape of defendant's statement was played for the jury. In the interview, defendant admitted touching the victim on two occasions. During the first incident, which he believed occurred three years before in the living room, he explained that the victim took off her pants and "I grabbed her butt and I jacked off in a distance." Defendant explained that he was rubbing his finger on her anus and then he "squeezed her cheek." The second incident occurred in October 2004. Defendant admitted touching

the victim's rectum with his finger. He explained that the victim was lying on her stomach on the floor and he was on his knees.

Defendant's sister, Toccara Grubb, and her boyfriend, Winston Smith, testified for the defense. They claimed that when they lived with the victim in early 2005, she threatened to make false molestation accusations against the boyfriend if she did not stop asking her to help around the house. In her testimony, the victim denied threatening Smith. Both defendant's sister and the victim's grandmother testified that the victim had been known to lie. The victim's grandmother testified that the victim had called her to complain about her mother's behavior, including that "she had seen her mom having sex."She and the victim also discussed "magazines" and "sex toys" the victim had seen in the mother's house.

DISCUSSION

1. *The Amended Information*

As set forth above, defendant was charged by information with six counts of violating section 288. The original information did not include any details regarding defendant's specific conduct on any particular occasion and alleged only that the crimes occurred on dates ranging from November 2002 to October 2004. Count three, which was presented at trial as the living room incident, was originally alleged to have occurred on or about November 2003 through June 2004. Count four, which was presented at trial as the bedroom incident, was alleged to have occurred on or about January 2004 through October 2004. During trial, both counts were amended to allege that they occurred between November 2002 and October 2004.

Defendant contends that the court erred "when, on the eighth day of trial, it granted the prosecutor's motion to amend the information to change the dates on which the offenses allegedly took place." Initially, defendant argues that the amendments violated section 1009, which provides in relevant part, "An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination." When a preliminary hearing has been waived, section 1009 bars the prosecution from

amending the information to charge a new offense. (*People v. Peyton* (2009) 176 Cal.App.4th 642, 654 [addition of a new charge under section 288 violated section 1009 where defendant had waived preliminary hearing on information alleging four counts under section 269]; *People v. Winters* (1990) 221 Cal.App.3d 997, 1007 [a charge of transportation of methamphetamine could not be added by amended information to a charge of possession of methamphetamine for sale, where the preliminary hearing had been waived].) In this instance, however, the information was not amended to allege new charges. Neither the statutory violation nor the alleged conduct and circumstances surrounding each of the two incidents were changed in any respect. The amendment merely modified the approximate time frame in which the crimes were alleged to have occurred. More significant amendments than this have been held not to violate section 1009. (See *People v. Peyton, supra,* 176 Cal.App.4th at pp. 656-657 [amendment of two counts under section 269 modifying charge from assault by oral copulation to assault by sexual penetration did not violate section 1009].)

Defendant argues that the amendments violated his right to due process. " 'It is a fundamental principle of due process that "one accused of a crime must be 'informed of the nature and cause of the accusation.' [Citation.]" [Citation.] This requirement is satisfied when the accused is advised of the charges against him so that he has a reasonable opportunity to prepare and present a defense and is not taken by surprise by the evidence offered at trial. [Citations.]' [Citation.] ' "Notice of the specific charge is a constitutional right of the accused. [Citation.] An information which charges a criminal defendant with multiple counts of the same offense does not violate due process so long as (1) the information informs defendant of the nature of the conduct with which he is accused and (2) the evidence presented at the preliminary hearing informs him of the particulars of the offenses which the prosecution may prove at trial. [Citations.] The information plays a limited but important role—it tells a defendant what kinds of offenses he is charged with and states the number of offenses that can result in prosecution. However, the time, place, and circumstances of charged offenses are left to the preliminary hearing transcript. This is the touchstone of due process notice to a

defendant. . . .” [¶] . . . [¶] When, as here, the defendant waives his right to the preliminary hearing, the pleading on file at the time of the defendant’s waiver must serve as the touchstone of due process notice to the defendant of the time, place, and circumstances of the charged offenses.” (*People v. Peyton, supra,* 176 Cal.App.4th at pp. 657-659, italics omitted.) “[I]t does not constitute a denial of due process to permit amendment of an information during trial if the amendment does not change the nature of the offense charged nor prejudice the defendant’s rights.” (*People v. Garringer* (1975) 48 Cal.App.3d 827, 833; see also *People v. Peyton*, *supra*, 176 Cal.App.4th at p. 659 [“ ‘Under the generally accepted rule in criminal law a variance [in pleadings] is not regarded as material unless it is of such a substantive character as to mislead the accused in preparing his defense’ ”]; § 960 [“No accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits”].)

Enlarging the period of time in which the incidents were alleged to have occurred did not violate defendant’s right to due process. The amendments did not change the nature of the offenses charged. Defendant was charged with violating section 288 in a particular manner on two specific occasions. Due to the victim’s age and the passage of time,[3] it was unclear when exactly those incidents occurred. The amendments provided reasonable leeway as to the specific time the incidents occurred based on the testimony at trial, without impinging on defendant’s right to fair notice and his ability to prepare a defense. Defendant argued that the victim was lying and that the molestation never occurred. Whether the incidents were alleged to have occurred when the victim was a few months older or younger than originally pled was of little relevance to the defense.

United States v. Ford (6th Cir. 1989) 872 F.2d 1231, relied on by defendant, is distinguishable. In that case, defendant was charged with illegal possession of a firearm

[3] The victim claimed to have been in third grade during both incidents and was in sixth grade at the time of trial in the fall of 2007. Thus, the incidents appear to have occurred sometime in 2004.

on or about September 28, 1987. (*Id.* at p. 1234.) Based on the evidence presented at trial, the jury was instructed that a conviction could be based on possession on any date from November 2, 1986, to September 28, 1987. (*Ibid*.) The Sixth Circuit held that the instruction constituted an impermissible amendment of the grand jury indictment. The court explained, "When 'on or about' language is used in an indictment, proof of the exact date of an offense is not required as long as a date reasonably near that named in the indictment is established. [Citation.] The supplemental instruction given by the district judge during the jury's deliberations nevertheless fails this test for two reasons. First, the district judge instructed the jury that it could find possession on any date over a period of approximately eleven months. It is clear to us that the November 1986 date is not a date that is reasonably near September 28, 1987. Second, we believe the 'reasonably near' rule . . . contemplates a single act the exact date of which is not precisely known by the grand jury and, therefore, does not need to be proved with exactitude. Here, the November 1986 (purchase), August 1987 (incident on highway), and September 1987 (domestic violence) events involved substantially separate incidents of alleged possession." (*Id.* at p. 1236.) In the present case, each incident was alleged in a separate count, there was no evidence or suggestion of more than one incident to which each count might have related, and the incidents occurred "reasonably near" the dates pled in the original complaint.

2. Defendant's Evidence Code Section 782 Motion

Prior to trial, defendant made a motion to admit evidence of the victim's prior exposure to sexual matters. Defendant sought to admit evidence that (1) the victim reported being touched all over her body by her brother; (2) the victim asked her uncle if she could "suck his dick"; (3) the victim told her grandmother she had seen pornographic videos and observed sexual acts in her home; and (4) the victim was seen in the basement of her house with her pants pulled down in front of a number of teenage boys. Defense counsel argued that this evidence would show that the victim had significant familiarity with sexual matters. He asserted that defendant would not receive a fair trial if the victim were unfairly "cloaked in an aura of credibility" stemming from a presumed inability

because of her age to describe the sexual acts she alleged if her allegations were not true. The court excluded all of the proffered evidence except limited testimony that the victim had discussed the pornographic videos or other sexual matters with her grandmother. The court explained that it did not find watching pornography, asking to perform a sexual act, or being molested by others relevant because none of this conduct was similar to the conduct alleged in this case. The court allowed the limited testimony regarding what the victim had told her grandmother to be admitted only insofar as it was relevant to demonstrate her apparent comfort discussing sexual matters with her grandmother. The court instructed the jury that this evidence was "admitted to help you to determine whether [the victim] was comfortable talking about sexual matters that made her feel uncomfortable that were being done by other people in the family." Prior to the grandmother's testimony, the court reiterated that the testimony should be considered only to determine "whether she was comfortable talking about inappropriate sexual exposure she was having with her conversations with her grandma." Defendant contends that the court erred in excluding the remaining evidence.

A defendant generally cannot question a complaining witness who alleges a sexual assault about the witness's prior sexual activity. (*People v. Woodward* (2004) 116 Cal.App.4th 821, 831.) However, an exception is provided in Evidence Code section 782, which sets out strict procedural limitations when the credibility of the complaining witness is attacked with evidence of the witness's prior sexual conduct. "Evidence Code section 782 provides a procedure for admitting evidence of the complaining witness's sexual conduct in certain sex offense prosecutions, including prosecutions brought under Penal Code sections 286, 288 and 288a. A written motion must be made which includes an offer of proof of the relevancy of the evidence of sexual conduct and its relevancy in attacking the credibility of the complaining witness. If the court finds the offer of proof sufficient it shall order a hearing out of the presence of the jury at which the complaining witness may be questioned. If at the conclusion of the hearing the court finds the evidence relevant and not inadmissible pursuant to Evidence Code section 352, it may

make an order stating what evidence may be introduced and the nature of the questions permitted." (*People v. Daggett* (1990) 225 Cal.App.3d 751, 757.)

Section 782 is applicable when the defense seeks to introduce evidence of prior sexual conduct by a child to show that the child had sexual knowledge independent of that allegedly obtained from the perpetrator of a child molestation. (*People v. Daggett*, *supra*, 225 Cal.App.3d at p. 757.) "A child's testimony in a molestation case involving oral copulation and sodomy can be given an aura of veracity by his accurate description of the acts. This is because knowledge of such acts may be unexpected in a child who had not been subjected to them. In such a case it is relevant for the defendant to show that the complaining witness had been subjected to similar acts by others in order to cast doubt upon the conclusion that the child must have learned of these acts through the defendant. Thus, if the acts involved in the prior molestation are similar to the acts of which the defendant stands accused, evidence of the prior molestation is relevant to the credibility of the complaining witness and should be admitted." (*Ibid*.)

Section 782 vests the trial court with "broad discretion" to weigh a defendant's proffered evidence prior to its submission to the jury, "and to resolve the conflicting interests of the complaining witness and the defendant." (*People v. Rioz* (1984) 161 Cal.App.3d 905, 916; *People v. Chandler* (1997) 56 Cal.App.4th 703, 711.) A trial court's exercise of discretion in admitting or excluding evidence "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Here, the trial court carefully considered the proffered evidence and determined that the other conduct lacked sufficient similarity with defendant's alleged conduct to be relevant. The court explained that admission of this evidence would be "harassment of the child and it would consume undue time and be of marginal relevance unless the acts she either admitted to seeing or that she engaged in or offered were acts similar to what she is alleging here." With respect to the allegation that her brother touched her, the court explained, "the touching by [her brother] is touching over the clothing, as I understand it

from the victim's statement. It's not touching her buttocks. The places she circled on the photograph—on the diagram were not her buttocks. It was her vagina. It was her breasts. It was her back. [¶] . . . [¶] . . . [S]he is not talking about penis-to-buttocks contact. She is not talking about unclothed contact. She is not talking about ejaculation. She is not talking about any kind of penetration. [¶] I think it's irrelevant. I think that . . . any marginal relevance is wildly outweighed by risk and confusion in having the jury start thinking about whether she's inviting this." With regard to the victim's comment to her uncle, the court explained, "We are not talking about any exposure the defendant may have given her to oral sex. She hasn't claimed there is any oral sex here. And the fact she may have known about oral sex doesn't necessarily mean she has any knowledge about sodomy or anal sex." Regarding the assertion that she was exposed to pornography, the court explained, "If there is some evidence that she told her grandmother that she had seen sodomy, that she had seen ejaculation, that she had seen somebody rubbing the butt so that this is something that she could have dreamed up based on other observations and same with respect to direct observations—if there is actually evidence she saw anything like what she is describing here, that's a different story." Finally, regarding the alleged incident with the teenage boys, the court explained that this incident was irrelevant because it postdates the alleged misconduct in this case and it will unnecessarily "consume a lot of time because it's going to put at issue the whole reaction to sexual abuse." The court warned the prosecutor, however, that if she "suggests to the jury, in argument or otherwise, that this child can't have made it up because children don't know things like this, it's going to kick that door wide open and the defense can bring it all in."

The court did not abuse its discretion in excluding evidence of the alleged incident with the teenage boys or the victim's comment to her uncle. The conduct involved in both those incidents is not at all similar to the conduct alleged in this case. Moreover, the court appropriately observed that introduction of evidence regarding the incident with the boys would prolong the proceedings unnecessarily. With regard to the victim's statement that her brother touched her body, the court's conclusion that the conduct was sufficiently

different from the specific conduct she reported by defendant is not unreasonable and was well within the court's discretion.

As to the evidence that the victim had previously viewed pornographic materials, the only evidence that was offered in this regard was the grandmother's hearsay testimony that the victim had told her she had seen such materials, which the victim herself denied on cross-examination. Not only was this evidence incompetent, but the offer of proof did not indicate that the proffered evidence would show that the sexual acts observed by the victim were similar to defendant's alleged conduct. We do not suggest that defendant was required to provide a detailed description of the lurid details of any pornographic materials the victim previously may have observed. However, defendant made no proffer whatsoever concerning the content of the videos or "adult television programs" the victim assertedly told the grandmother she had seen, or when or for how long she had watched them.[4] If the victim did no more than glimpse pornographic films (if that is what they were) that other adults were watching, that fact would be of little if any relevance to an evaluation of the truth of the victim's testimony concerning what defendant had done to her. The same is true with respect to the victim's asserted observation of her mother engaging in "sexual acts." In the absence of any further specificity, defendant's proffer was not sufficient to establish the relevance of such evidence or to have compelled the trial court, in the exercise of its discretion, to admit the testimony that was described.

[4] Defendant's written offer of proof submitted with his motion provides only that "The defense is informed and believes that [the victim] was exposed to adult television programs and videos as well as had the opportunity to observe her mother engaging in sexual acts with men inside their residence, prior to the time [the victim] accused [defendant] of molesting her." In arguing that this evidence should be received, defendant's attorney represented that, if the victim herself denied these facts, the grandmother would testify that the victim had told her that she had made these observations.

3. Defendant's confession

Prior to trial, defendant moved to suppress his confession on the ground that it was obtained in violation of *Miranda* and was involuntary. The trial court decided the motion based on the videotape of defendant's interrogation. No live testimony was presented at the hearing. At the start of the interrogation as shown on the tape, Officer Cook thanks defendant for coming to the station to see him and explains that he is not under arrest. Defendant initially indicated that he did not know why the police wanted to speak with him, but then acknowledged that he was aware of the victim's accusations. When asked about what had happened between him and the victim, defendant claimed that nothing had happened. For the first 37 pages of the transcript defendant repeatedly denied having any sexual contact with the victim. At that point, Officer Cook showed defendant a felony arrest warrant for defendant's arrest. Cook told defendant that he, a psychiatrist, the interviewers at the child interview center and the superior court judge all believed that something had happened between defendant and the victim. Cook then read defendant his *Miranda* rights and, at defendant's request, read the warnings a second time. Defendant indicated that he understood his rights, but did not expressly waive those rights. Shortly thereafter, defendant acknowledged having sexual contact with the victim as set forth more fully above.

The trial court rejected defendant's argument that his confession was obtained in violation of *Miranda* and denied the motion on the ground that defendant was not in custody prior to the presentation of the warrant for his arrest. The court explained, "As to the giving of *Miranda* warnings, the circumstances that I find are that he was told he was not under arrest. He was told he was free to go. There was only one officer. He was not in uniform. It doesn't appear from the videotape he was armed. It looks on his left hip is a telephone and not a gun. The defendant came voluntarily. He came on his own steam. He was not transported there. There were no handcuffs. He was offered and given a glass of water. He had known that there was a problem for over a year. And he knew that the police maybe looking for him. And he even said he tried to get in touch with them on the videotape. [¶] So this isn't like he was suddenly confronted with some new situation

where he felt—where he would have felt—a person would have felt they were suddenly accused and under arrest. He made reference in the videotape to the fact he had known about this for a year and that his family had kicked him out of the house as a consequence. [¶] There were only 40 minutes or so of conversation. It wasn't a prolonged interrogation nor an interview before the *Miranda* warnings were given. It appears the door was not closed. I looked carefully and rewound the tape to see if I heard a door being closed, and it looked like it was ajar. The officer used a normal tone of voice. Although some of the content was accusatory, it was conversational. He wasn't shouting. He wasn't pounding on the table. He wasn't threatening. [¶] And I don't find, given the circumstances, that a reasonable person would feel that they were not at liberty to terminate the interrogation. And the point at which he would have felt he was not at liberty to terminate the interrogation was when he was shown the . . . warrant. And that really obviously gave the defendant pause. And there was a noticeable change in his understanding of his situation. As I looked at the videotape—and that's why he appeared distracted after the *Miranda* warnings were read to him the first time because suddenly he is realizing, oh, this is a problem. And that says to me that beforehand, he thought it was conversational. And, in fact, it appeared to me he was using the interview at least as much as the officer was to talk about the credibility of the complaining witness and her experiences and the way she was raised to deflect any concern about him as opposed to about her. [¶] . . . [¶] After the warnings were given and he appeared to be distracted by the warrant, the officer asked him, do you need me to repeat the Miranda warnings? And the defendant said, yeah, read them again or say it again. And the officer did say it again. And the defendant at that time said I understand them all. [¶] It appeared to me, after watching the videotape, that although he was obviously visibly distracted the first time, he was listening the second time and expressly said, 'I understand them all.' And he also—when asked, 'Do you understand your rights?' he said, 'Yes.' And only after that he added, 'I understand them all.' [¶] So it says to me, as I watched the videotape, it was a knowing and understanding acknowledgement of his rights; and his agreement to talk thereafter was in light of his understanding of his rights."

"The requirements of *Miranda* are well established. To assure protection of the Fifth Amendment privilege against self-incrimination, 'a suspect may not be subjected to an interrogation in official "custody" unless he has previously been advised of, and has knowingly and intelligently waived, his rights to silence, to the presence of an attorney, and to appointed counsel if he is indigent.' " (*People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1480.) "*Miranda* warnings are required 'as soon as a suspect's freedom of action is curtailed to a "degree associated with a formal arrest." ' [Citations.] This determination presents a mixed question of law and fact. [Citation.] We apply a deferential substantial evidence standard to the trial court's factual findings, but independently determine whether the interrogation was custodial. [Citation.] [¶] Custody determinations are resolved by an objective standard: Would a reasonable person interpret the restraints used by the police as tantamount to a formal arrest? [Citations.] The totality of the circumstances surrounding an incident must be considered as a whole. [Citations.] Although no one factor is controlling, the following circumstances should be considered: '(1) [W]hether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention; (3) the location; (4) the ratio of officers to suspects; and (5) the demeanor of the officer, including the nature of questioning.' [Citation.] Additional factors are whether the suspect agreed to the interview and was informed he or she could terminate the questioning, whether police informed the person he or she was considered a witness or suspect, whether there were restrictions on the suspect's freedom of movement during the interview, and whether police officers dominated and controlled the interrogation or were 'aggressive, confrontational, and/or accusatory,' whether they pressured the suspect, and whether the suspect was arrested at the conclusion of the interview." (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403-1404, fn. omitted.)

We agree with the trial court that defendant's interrogation did not become custodial until he was presented with the warrant, at which time he was properly advised of his *Miranda* rights. We also agree with the trial court that defendant's implied waiver of those rights was knowing and voluntary. (See *People v. Whitson* (1998) 17 Cal.4th 229, 248, citing *People v. DeVaughn* (1977) 18 Cal.3d 889, 899, fn. 8 [" 'Once the

defendant has been informed of his [*Miranda*] rights, and indicates that he understands those rights, it would seem that his choosing to speak and not requesting a lawyer is sufficient evidence that he knows of his rights and chooses not to exercise them' "]; *People v. Sully* (1991) 53 Cal.3d 1195, 1233 [the defendant impliedly waived his *Miranda* rights when, after being admonished of these rights, responded that he understood them and gave a tape recorded statement to police]; *People v. Davis* (1981) 29 Cal.3d 814, 823-826 [16-year-old defendant impliedly waived his Miranda rights when, after being advised of these rights and responding that he understood them, he made statements to investigating officers leading to his arrest].)

We also conclude that defendant's confession was voluntary. "The Fourteenth Amendment to the federal Constitution and article I, section 15, of the state Constitution bar the prosecution from using a defendant's involuntary confession. [Citation.] The federal Constitution requires the prosecution to establish, by a preponderance of the evidence, that a defendant's confession was voluntary. [Citation.] The same is now true under California law as a result of an amendment to the state Constitution enacted as part of Proposition 8, a 1982 voter initiative. [Citation.] . . . [¶] Under both state and federal law, courts apply a 'totality of circumstances' test to determine the voluntariness of a confession. [Citations.] Among the factors to be considered are ' "the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity" as well as "the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health." ' [Citation.] On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review. [Citations.] In determining whether a confession was voluntary, '[t]he question is whether defendant's choice to confess was not "essentially free" because his will was overborne.' " (*People v. Massie* (1998) 19 Cal.4th 550, 576.)

Defendant argues that his confession was involuntary because he was only 21, had no criminal experience and was subjected "[t]hroughout the entire interrogation [to] lies, deception, trickery, promises, accusations and threats." Cook lied to him about the

evidence against him. He emphasized that this was defendant's only chance to tell his side of the story. Cook implied that what defendant had done to the victim was not a serious offense and that he would be better off by admitting what he had done. Cook said, "I'm not saying that anything heinous or violent happened here. Okay? What I am saying is these was some inappropriate touching going on between you and [the victim]." Later Cook said, "Listen to me. The only thing that's gonna help you is to admit that something happened. And like I said, this is not a very serious offense. There's no force. There's no nothing, you know, but something did happen. Okay? You're not a bad person. You're a good dude. And for whatever reason that day your emotions got out of control and you . . . did something that shouldn't a done. . . . [A]ll's your doing, making these excuses up is just gonna make . . . you look guiltier that you are. What needs to happen is, is you need to be a man and be accountable for your actions, and apologize for what you did to her, because she's emotionally scarred and has been ever since that happened. And that's gonna bring some closure to this and to you. That's the only thing that's gonna help you. And then, you know, when this all ends up in court you can say, hey, I'm a you know a whole person. I made a mistake."

In general, a confession is involuntary if motivated by a promise of leniency or benefit to the defendant, whether express or implied. (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 210.) "However, mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary." (*People v. Jimenez* (1978) 21 Cal.3d 595, 611, overruled on other grounds in *People v.* Cahill (1993) 5 Cal.4th 478, 509-510, fn. 17.) In *People v. Hill* (1967) 66 Cal.2d 536, 549, the court explained, "The line to be drawn between permissible police conduct and conduct deemed to induce or to tend to induce an involuntary statement does not depend upon the bare language of inducement but rather upon the nature of the benefit to be derived by a defendant if he speaks the truth, as represented by the police. . . . [¶] When the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we can perceive nothing improper in such police activity. On the other hand,

if in addition to the foregoing benefit, or in the place thereof, the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible."

Here, based on the totality of the circumstances, Cook's interrogation techniques did not render defendant's confession involuntary. Defendant came to the police station on his own volition, fully aware of the allegations against him. As the court noted, "[defendant] was using the interview at least as much as the officer was to talk about the credibility of the complaining witness and her experiences and the way she was raised to deflect any concern about him." Cook's interrogation techniques, including misstating the evidence against defendant and encouraging him to tell the truth, fall within the bounds of acceptable police behavior. (See *People v. Jones* (1998) 17 Cal.4th 279, 299 [deception as to the evidence against a suspect is permissible and does not "offend any constitutional guaranty," as it is "not ' "of a type reasonably likely to procure an untrue statement" ' "].) Contrary to defendant's assertion, there was no express or implied promise of leniency.

4. *Prosecutorial Misconduct*

" 'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such " 'unfairness as to make the resulting conviction a denial of due process.' " [Citations.] Under state law, a prosecutor who uses deceptive or reprehensible methods commits misconduct even when those actions do not result in a fundamentally unfair trial.' " (*People v. Lopez* (2008) 42 Cal.4th 960, 965, italics omitted.) Defendant contends that the prosecutor committed misconduct by making the following statement during his rebuttal argument: "At the beginning of this trial you were told there was a presumption of innocence. So, at this point the presumption of innocence has long been lifted. That presumption of innocence states that before evidence is presented, that there is a presumption of innocence, the defendant is innocent. Well, we

are beyond that stage . . . .” Defense counsel interrupted and objected on the ground that the prosecutor was suggesting that the “presumption of innocence somehow ends.” The court overruled the objection, explaining that the jury would remember the instructions about the presumption of innocence and the prosecution’s burden.

The presumption of innocence is a basic component of a fair trial, and under the presumption, a defendant is presumed innocent until proven guilty. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 483-487; *Coffin v. United States* (1895) 156 U.S. 432, 453.) Section 1096 states that a criminal defendant “is presumed to be innocent until the contrary is proved.” It is well established that the presumption of innocence remains with the accused throughout every stage of the trial, including the jury deliberations, and it is extinguished only upon the jury’s determination that guilt has been established beyond a reasonable doubt. (*Mahorney v. Wallman* (10th Cir. 1990) 917 F.2d 469, 471, fn. 2; see also *People v. Rogers* (2006) 39 Cal.4th 826, 888-889; *People v. Mayo* (2006) 140 Cal.App.4th 535, 542-543; *United States v. Perlaza* (9th Cir. 2006) 439 F.3d 1149, 1169-1172.) Arguably, the prosecutor’s comment that the presumption had been lifted misstated the law with regard to the presumption of innocence. Nonetheless, the misstatement was relatively insignificant and given the court’s proper instructions regarding the presumption of innocence, there is no likelihood that the prosecutor’s comments affected the jury’s deliberations in this case.

Disposition

The judgment is affirmed.

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Pollak, Acting P.J.

We concur:

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Siggins, J.

_____
Jenkins, J.